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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

JUNE TERM. 1963

No. [redacted] 178

LOCAL NO. 201, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES (AFL-CIO) and DONALD F. BRUSTAD, individually and as President of said Local No. 201;
Petitioners,

vs.

CITY OF MUSKEGON, a Municipal Corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

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Petitioners,

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

(Numbers in parentheses followed by letter "a" indicate pages of the appendix of defendant-appellant, respondent here, filed in the Court below unless otherwise clearly identified. Lower case roman numerals in parentheses indicate pages of the Appendix attached hereto).

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Michigan entered March 7, 1963.

OPINIONS BELOW

The opinion of the Honorable Noel P. Fox, Judge of the Circuit Court for the County of Muskegon (Michigan) in the Chancery action which framed the issues that form the basis of this petition is not officially reported but may

be found in the record prepared for use of the Court below (77a). The Opinion of the Supreme Court of the State of Michigan (i) is reported at 369 Mich. 384, 120 N. W. 2nd 197.

JURISDICTION

The judgment of the Supreme Court of Michigan (xii) reversing the Decree of the Circuit Court for the County of Muskegon (196a) and remanding the cause to it with directions to dismiss was entered on March 7, 1963. The jurisdiction of this Court is invoked under 28 *U. S. C.* 1257 (3).

QUESTION PRESENTED

May the City of Muskegon constitutionally restrain the free association of its police officers by forbidding membership in and requiring resignation from their labor organization or from any organization in any manner identified with any federation or labor union which admits to membership persons who are not members of the Muskegon Police Department in the absence of a showing of compelling public necessity or clear and present danger?

The Circuit Court for the County of Muskegon answered "No."

The Supreme Court of the State of Michigan answered "Yes."

Petitioners respectfully contend that the answer should be "No."

CONSTITUTIONAL PROVISIONS INVOLVED

1. *United States Constitution, Amendment* I:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

2. *United States Constitution, Amendment* XIV, Section 1:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

A. Chronology and History of the Litigation.

For approximately seven years prior to March, 1961 a majority of the police officers employed by the City of Muskegon have been members of Local No. 201 of the American Federation of State, County and Municipal Employees (AFL-CIO) comprised of governmental employees of the City of Muskegon, the County of Muskegon and the surrounding municipalities and townships (231a, 232a). Of approximately 45 to 50 Muskegon Police Officers eligible for membership in Local No. 201, 35 are members (232a, 233a). The President of Local No. 201 is petitioner, Muskegon Police Officer Donald F. Brustad (231a).

The City of Muskegon has not at any time opposed membership in Local No. 201 by any of its employees, including police officers (221a), and has actually checked off the dues of police as well as other members of the Local (230a). No claim has been made over the years by anyone that union membership has adversely affected the police officers' performance of their duties (222a, 242a).

On Monday, March 13, 1961 at a "Service Committee" meeting of the City of Muskegon (City Commission meeting behind closed doors) in the office of the City Manager, one of the City Commissioners proposed the prohibition of union membership by policemen (218a). On Tuesday, March 14th at its regular meeting, the Muskegon City

Commission adopted by a vote of 5 to 2 Resolution No. 61-155. Its operative language provided:

> "No police officer of the City of Muskegon Police Department shall hereafter be, or become, a member of any organization in any manner identified with any Federation or Labor Union which admits to membership persons who are not members of the Muskegon Police Department, or which would in any way exact prior consideration and prevent such officer from performing full and complete police duty at any time. Any Police Officer now a member of such unions shall disassociate himself within thirty days from this date. Failure to comply will constitute reason for immediate dismissal." (57a, 58a).

The Muskegon Police Chief immediately issued a departmental rule in identical terms (203a, 61a, 62a).

On April 7, 1961, one week before the effetive date of the regulation, these petitioners filed a Chancery action (No. 29416) seeking an injunction to prevent implementation of the resolution, as threatened, on April 14, 1961.* A temporary restraining order was issued in the Chancery action on April 17, 1961 (70a).

On April 13, 1961 plaintiff filed an amended and supplemental bill of complaint in the Chancery action (58a-70a), asserting as grounds for relief that the proposed regulation violated various Michigan statutes and constitutional provisions as well as Articles I and XIV of the amendments to the Constitution of the United States. It is upon this amended and supplemental bill of complaint that the issue here before this Court was joined in the Circuit Court

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*A parallel mandamus action was filed (Muskegon County Law No. 16850) between substantially these same parties to compel submission of the issue to the electorate and was litigated concurrently with this action. The Circuit Court ruled adversely to plaintiffs in that action; no appeal was taken. The mandamus issues are not presented here but mention is made of the existence of that action to explain the numerous references to it in the title and body of the record prepared for the use of the Court below.

and upon which that Court issued its opinion on October 24, 1961 (77a et seq.). For the various reasons therein stated, the Circuit Court held that the action of the respondent was unconstitutional and void, and on November 20, 1961 issued its decree permanently enjoining the City from giving effect to Resolution No. 61-165 or any regulation or rule adopted by the Muskegon Police Department or any other city agency pursuant thereto or in accordance therewith (196a).

An appeal was regularly taken by the respondent City to the Supreme Court of the State of Michigan and briefs and arguments were received. (The American Civil Liberties Union of Michigan was given leave to file a brief Amicus Curiae). On March 7, 1963 the Michigan Supreme Court issued its opinion and order reversing the decree of the Circuit Court and remanding the cause for entry of an order of dismissal (xii).

B. Presentation of the Federal Question.

Violation of Article I and Article XIV of the Amendments to the Constitution of the United States was first asserted by petitioner in his amended and supplemental bill of complaint filed April 13, 1961 (67a, 68a). The presentation of this question was expressly recognized by the Muskegon County Circuit Court in its opinion (77a, et seq.), wherein it held among other things that the proposed regulation deprived the police officer plaintiff of freedom of speech and assembly. The Federal question was briefed by both parties in the Michigan Supreme Court and that Court at least recognized that such issues had been presented by observing in its opinion that:

> "the burden rests on those assailing it to establish that there is an unwarranted, and therefore arbitrary, interference with rights protected by constitutional guaranties" (v).

REASONS FOR GRANTING THE WRIT

A. Importance of the policy question.

Despite the legal raiment in which the issue finds itself, the question asked of this Court herein is basically one of philosophy or policy, and is perhaps one of the half-dozen such questions most likely to continue to vex twentieth century man during the foreseeable future: *To what extent will government in an open society be permitted to undertake prophylactic regulation of the speech, association, religious practice, and reading habits of the citizenry in the absence of a showing that such pre-censorship is justified by an overwhelming public urgency?*

All aspects of this question are not here presented but a critical case is, for here we are not only concerned with the right of policemen to maintain their membership in their labor union but the extent to which regulation of the lives of public officials is justified by the fear that they may otherwise betray their public trusts.

The argument advanced by the municipality in this case is that police officers, unless prohibited from membership in a labor union which is affiliated with workers in other fields, will exhibit "split loyalty" when called upon to police labor disputes.* If the relatively weak brotherhood of common union affiliation is feared as a source of split loyalty, how much more to be feared are the incomparably stronger bonds of religion, blood relationship, political affiliation, race, social friendship? If a municipality may freely engage in prophylactic regulation of the union affiliation of its police officers lest they be tempted to favoritism, it should be able by appropriate regulation to specify the religion, the race or the political affiliation of a policeman; it should be able to forbid his membership in the Masons, the Catholic Church, the NAACP and the American Legion for this same reason. This Court with its answer to the question herein posed will cast light upon whether these other associations with their incom-

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*It is emphasized that there is no evidence in the record which would justify this assumption.

parably stronger danger of split loyalty may also be regulated as to police officers.

And if society is fatally vulnerable to the dereliction of police officers affected by split loyalty, how much more vulnerable is it to public officials whose functions are broader, whose discretion is greater, whose power is more critical to its existence? City Commissioners, Circuit Judges, Supreme Court Justices are by this logic much more vulnerable to regulation of association and affiliation, since in them, split loyalty might be truly catastrophic to society.

If regulation of the associations of police officers into labor unions is constitutional because it is necessary as a measure of social self-preservation, how can it be denied that even more stringent regulation of the associations of higher officials is likewise constitutional?

B. Importance of the specific legal question.

Governmental employees, in general, and police officers, in particular, are entitled to know how and with whom they may associate in labor organizations without restraint from their employers. The decisions of the various state courts of last resort on the question of unionism among police officers, none of which has been reviewed by this Court, are, with the single exception of the case at bar, all cases decided prior to 1947. In view of the substantial developments of the law with respect to freedom of association since 1958,* a fresh look, and for this Court a first look, at the right of freedom of association in the context of government employment would seem to be highly justified, and would be of direct benefit to several million government employees and their governmental employers.

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*See, e.g., *NAACP vs. State of Alabama*, 357 U. S. 449, 78 Sup. Ct. 1163 (1958); *Bates vs. City of Little Rock*, 361 U. S. 516, 80 Sup. Ct. 412 (1960); *Louisiana vs. NAACP*, 366 U. S. 293, 81 Sup. Ct. 1333 (1961).

LEGAL ARGUMENT

A. A Municipal Police Officer has a Constitutionally Protected Right to Freedom of Association.

Freedom of association is secured to all persons within the jurisdiction of the respective states and is insulated from state impingement by the due process clause of the Fourteenth Amendment as an aspect of free speech, free press and the right of peaceable assembly. *NAACP vs. State of Alabama*, 357 U. S. 449, 78 S. Ct. 1163 (1958):

> "Effective advocacy of both public and private points of view, particularly controversial ones, is undoubtedly enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly. DeJonge v. Oregon, supra; Thomas v. Collins, 323 U. S. 516, 530, 89 L. ed. 430, 444, 65 S. Ct. 315. 'It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the due process clause of the Fourteenth Amendment which embraces freedom of speech.' See Gitlow v. New York, 268 U. S. 652, 666, 69 L. ed. 1138, 1145, 45 S. Ct. 625; Palko v. Connecticut, 302 U. S. 319, 324, 82 L. ed. 238, 291, 58 S. Ct. 149; Cantwell v. Connecticut, 310 U. S. 296, 303, 84 L. ed. 1213, 1217, 60 S. Ct. 900, 128 A. L. R. 1352; Staub v. Baxley, 355 U. S. 315, 321, 2 L. ed. 302, 78 S. Ct. 277. Of course, it is immaterial whether the belief sought to be advanced by association pertains to political, economic, religious or cultural matters, and State action which may have the effect of curtailing freedom of association is to be closely scrutinized. * * *" (78 Sup. Ct. 1171).

Accord: *Bates vs. City of Little Rock*, 361 U. S. 516, 80 Sup. Ct. 412 (1960); *Louisiana vs. NAACP*, 366 U. S. 293, 81 Sup. Ct. 1333 (1961).

There is no question that municipal action is State action within the meaning of the constitutional prohibition. *Staub vs. City of Baxley*, 355 U. S. 313, 78 Sup. Ct. 277

(1958); *Lovell vs. City of Griffin*, 303 U. S. 444, 58 Sup. Ct. 666 (1938). And it is clear that this constitutional protection extends to a public servant in his right to continue in the enjoyment of his occupation. *Wieman vs. Updegraff*, 344 U. S. 183, 73 Sup. Ct. 215 (1952); *Shelton vs. Tucker*, 364 U. S. 479, 81 Sup. Ct. 247 (1960).

We believe that one of the fundamental errors into which the Supreme Court of the State of Michigan fell is its failure to note and give proper weight to this latter principle of constitutional law, as exemplified by its statement:

> "The restriction imposed is not directed at a class as such but, rather, solely at those who have sought and obtained employment in the police department of the defendant City" (v).
>
> "* * * there is no provision of either state or federal constitution which gives to individuals the right to be employed in government service or the right to continue therein" (ix).
>
> "As before suggested they cannot claim a constitutional right to be appointed as members of said department, or to continue therein" (x).

The Michigan Supreme Court seems to have converted the axiomatic principle that there is no constitutional right to be a policeman into a holding that the City may therefore lay an unconstitutional burden upon that employment. Contra: *Wieman vs. Updegraff*, supra, and *Shelton vs. Tucker*, supra.

B. In the absence of an affirmative showing of clear and present danger or an overriding public interest, municipalities may not regulate the associations of police officers.

The second fundamental error into which we believe the Supreme Court of the State of Michigan has fallen is in its contention that:

> "the burden rests on those assailing it [the regulation] to establish that there is an unwarranted, and

therefore arbitrary, interference with rights protected by constitutional guaranties" (v).

And that:

> "plaintiffs herein have not borne the burden of proof of showing that members of the police department of Muskegon are deprived by the enforcement of the regulation in question of any constitutional rights to which they are entitled" (x).

We believe this is a fundamental misconception of the issue.

Where first amendment freedoms are involved, the government must justify its regulation. The law on this subject is clearly stated by the United States Supreme Court in *Bates vs. Little Rock*, supra (1960):

> "We conclude that the municipalities have failed to demonstrate a controlling justification for the deterrence of free association which compulsory disclosure of the membership lists would cause." (361 U. S. 527).
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> • • •
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> "Decision in this case must finally turn, therefore, on whether the Cities, as instrumentalities of the State, have demonstrated so cogent an interest in obtaining and making public the membership list of those organizations as to justify the substantial abridgement of associational freedoms which such disclosure will effect. Where there is a significant encroachment upon personal liberty the State may prevail only upon showing a subordinating interest which is compelling." (361 U. S. 524).

And see *NAACP vs. Alabama*, supra (1958):

> "It [NAACP] contends that governmental action which, although not directly suppressing association, nevertheless carries this consequence, can be justi-

fied only upon some overriding valid interest of the State." (357 U. S. 460).

* * *

"We turn to the final question whether Alabama has demonstrated an interest in obtaining the disclosures it seeks from petitioner which is sufficient to justify the deterrent effect which we have concluded these disclosures may well have on the free exercise by petitioner's members of their constitutionally protected right of association. See American Communications Ass'n v. Douds, supra, 339 U. S. at page 400; 70 S. Ct. at page 684; Schneider v. State, 308 U. S. 147, 161, 60 S. Ct. 146, 150, 84 L. Ed. 155. Such a '* * * subordinating interest of the State must be compelling,' Sweezy v. New Hampshire, 354 U. S. 234, 265, 77 S. Ct. 1203, 1219, 1 L. ed. 2d 311 (concurring opinion)." (357 U. S. 463).

The cases, we believe, effectively dispose of the issue of *who* must present the evidence in justification of the regulation. Clearly, it is the City. This record discloses no attempt to do so.

This Court has also spoken on the subject of *what* such justifying evidence must be. In a line of history making decisions it has declared that a legislative regulation, Federal or State, which purports to foreclose a constitutional liberty is invalid in the absence of a showing of *"clear and present danger"* to the orderly processes of government. This doctrine was first announced by this Court in *Schenck vs. United States*, 249 U. S. 47, 39 Sup. Ct. 247 (1919):

"Thus the question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."

See Holmes, J. dissenting in *Abrams vs. U. S.*, 250 U. S. 616, 630, 40 Sup. Ct. 17 (1919) and in *Gitlow vs. New York*, 268 U. S. 652, 673, 45 Sup. Ct. 625 (1925). And

this test was clearly accepted by the entire Supreme Court in *Bridges vs. California*, 314 U. S. 252, 62 Sup. Ct. 190 (1941); *Thornhill vs. Alabama*, 310 U. S. 88, 60 Sup. Ct. 736 (1940). And see Brandeis, J. concurring in *Whitney vs. California*, 274 U. S. 357, 376, 47 Sup. Ct. 641 (1927); *Herndon vs. Lowry*, 301 U. S. 242, 57 Sup. Ct. 732 (1937); *Cantwell vs. Connecticut*, 310 U. S. 296, 60 Sup. Ct. 900 (1940); Black J. dissenting in *Communist Party vs. Subversive Activities Control Board*, 367 U. S. 1, 81 Sup. Ct. 1357 (1961); Black, Douglas and Warren, JJ. dissenting in *Konigsberg vs. State Bar*, 366 U. S. 36, 56, 81 Sup. Ct. 997 (1960); *Wood vs. Georgia*, 370 U. S. 375, 82 Sup. Ct. 1364 (1962).

It is conceded that this Court has at other times adhered to a test of perhaps less scope, but one which nevertheless clearly condemns the City's action in the case at bar. At the very least, a purported regulation must be shown to carry a "compelling subordinating public interest" as its justification. *Bates vs. Little Rock*, supra; *Sweezy vs. New Hampshire*, 354 U. S. 234, 77 Sup. Ct., 203 (1957) (concurring opinion); *NAACP vs. Alabama*, supra. The respondent here has shown *no* evidence of *any* danger or *any* compelling interest. (cf. opinion of Circuit Judge at 151a, 153a):

> "The assumption made by the defendant City, that is the majority of the Commission, is predicated upon an unproven assumption of wrong-doing. The record is void of any evidence to support such a conclusion or such a presumption" (153a).

The Michigan Supreme Court did not assert in its opinion that the record demonstrated public danger or any compelling interest but *assumed* that the City Commission's attitude was justified:

> "It may be assumed that in taking the action in question due consideration was given to local conditions and to the protection of the public interest generally" (v).

It is true that the majority of the City Commission made some effort to bolster its case by a preamble to its resolution of March 14, 1961 (iii), asserting that the majority feared the problem of "split loyalty."* But we respectfully submit that there must be something more than a vague apprehension of harm by a governmental body to justify its direct invasion of a constitutionally denied sphere of legislative activity. It is, we submit as a matter of abstract logic, highly doubtful that a stated apprehension of harm can be justified in the absence of some showing that such harm has actually occurred somewhere, sometime, under some circumstances.

C. The city's proposed regulation is unconstitutionally broad.

Perhaps the most striking feature of the City's regulation is its extreme broadness of scope where obviously a much narrower one (or no additional legislation at all) would do to meet the harm apprehended. Where society can be protected by a narow regulation carefully drawn so as to minimize interference with constitutionally protected freedoms, a broader invasion of such freedoms will be stricken down.

In *Shelton vs. Tucker*, supra the Supreme Court held a State law requiring public school teachers to disclose *all* organizations to which they have belonged over a five year period unconstitutional as an interference with freedom of association. The Court noted that the avowed purpose of protecting schools from teacher unfitness and subversion might be fully achieved by a requirement much narrower and more precise in both aim and impact:

> "In a series of decisions this Court has held that, even though the governmental purpose be legitimate

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*"But governmental action does not automatically become reasonably related to the achievement of a legitimate and substantial governmental purpose by mere assertion in the preamble of an ordinance." *Bates vs. Little Rock*, supra.

and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose." (364 U. S. 488).

• • •

"The unlimited and indiscriminate sweep of the statute now before us brings it within the ban of our prior cases. The statute's comprehensive interference with associational freedom goes far beyond what might be justified in the exercise of the State's legitimate inquiry into the fitness and competency of its teachers." (364 U. S. 490).

See: *Lovell vs. Griffin*, supra; *Schneider vs. Irvington*, 308 U. S. 147, 60 Sup. Ct. 146 (1939); *Cantwell vs. Connecticut*, supra; *Martin vs. Struthers*, 319 U. S. 141, 63 Sup. Ct. 862 (1943); *Saia vs. New York*, 334 U. S. 558, 68 Sup. Ct. 1148 (1948); *Talley vs. California*, 362 U. S. 60, 80 Sup. Ct. 536 (1960).

In *Louisiana vs. NAACP.* supra, Mr. Justice Douglas for a unanimous Court noted:

"We are in an area where, as *Shelton v. Tucker*, [citation] emphasized, any regulation must be highly selective in order to survive challenge under the First Amendment. As we there stated: '• • • even though the governmental purpose being legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.'" (366 U. S. 296).

Compare the affirmance of narrow regulation in *Communist Party vs. Subversive Activities Control Board*, supra, and *United States vs. Harriss*, 347 U. S. 612, 74 Sup. Ct. 808 (1954).

Circuit Judge Fox in his opinion observed that although "split loyalty" and failure to carry out one's duty is

what the City Commission *said* it feared, what it *did* was to prohibit all meaningful association:

> "As freedom of the press must remain unabridged, responsible only for abuses, such as libel, obscenity and pornography, so also must freedom of association remain unabridged, save only for abuses. The right must remain, the abuse, only, must go or be controlled.
>
> "So it is with a Police Officer. He may exercise his freedom of association. He may become and remain a member of a legitimate federated governmental employees' association. Mere membership, alone, is not punishable as an offense.
>
> "However, if, as a Police Officer, he so uses his membership or he permits his membership to so influence his actions that his conduct while engaged in the discharge of his duties constitutes a failure to perform his duty impartially, and this failure amounts to malfeasance, nonfeasance or misfeasance, he may be punished for this particular abuse, and a regulation narrowly drafted to reach this abuse may be valid. He may be subject to disciplinary action, even to the extent of being discharged from his employment" (150a, 151a).
>
> • • •
>
> "This evil, namely, of a Police Officer performing his official acts in a partial or biased manner cannot be regulated by means which broadly stifle fundamental personal liberties, such as freedom of association" (155a).

As a practical matter, it is undoubted that the Police Chief possesses the inherent authority to discipline for improper performance of duty without the necessity for writing a specific regulation on the subject. If more is desired, a narrow, explicit and precise regulation of police favoritism would surely be valid.

SUMMARY

It is respectfully asserted that the Fourteenth Amendment to the United States Constitution, embracing as it does those rights essential to a scheme of ordered liberty, will strike down state legislative restriction upon freedom of association, in the absence of proof by the legislating authority of a clear and present danger of evils which it has the right to prevent or of an overriding governmental necessity which justifies its invasion of this constitutionally protected field. And irrespective of any showing, such regulation will only be upheld where it invades to the least degree possible the protected constitutional area and is so narrowly drawn that it reaches only the evil apprehended.

We respectfully submit that judged by these standards, the action of the City Commission must be struck down.

CONCLUSION

For the foregoing reasons, it is requested that this petition for a writ of certiorari to the Supreme Court of the State of Michigan be granted.

Respectfully submitted,

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OPINION OF SUPREME COURT
(Filed March 7, 1963)

STATE OF MICHIGAN
SUPREME COURT

LOCAL NO. 201, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES (AFL-CIO) and DONALD F. BRUSTAD, individually and as President of said Local No. 201,
Plaintiffs and Appellees,

vs.

CITY OF MUSKEGON, a Municipal Corporation,
Defendant and Appellant.

Cal. No. 49590

LOCAL NO. 201, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES (AFL-CIO) and DONALD F. BRUSTAD, individually and as President of said Local No. 201,
Plaintiffs and Appellees,

vs.

ARTHUR LEUTSCHER, MUSKEGON CITY CLERK, ALFRED MEYERS, G. HILDING CARLSON, MELVIN SCHULZ, VICTOR YUBICK, HENRY KLEVERING, STEVE YONKER, DONALD SEYFERTH, MUSKEGON CITY COMMISSIONERS,
Defendants and Appellants.

BEFORE THE ENTIRE BENCH.

CARR, C. J.

The question at issue in this litigation concerns the validity of a rule adopted by the chief of police of the City of Muskegon on March 16, 1961. Such action was taken pursuant to sections 2-103 and 2-104 of the municipal code of ordinances which, insofar as material here, read as follows:

"Sec. 2-103 *Rules, regulations.* — The following rules and regulations shall govern the police department:

"Sec. 2-104 *Chief of police; powers and duties.* — (1) He shall be the director of the police department subject to these rules and regulations, and shall devote

his full time and attention to the management of this department.

"(2) He shall be responsible for the government, efficiency and general good conduct of the police department, and shall supervise the instruction of the members of the department in their duties.

"(3) He shall have the power to prescribe, promulgate and enforce rules and regulations for the government of the members and employees of the department, which shall be approved by the city manager and filed with the city clerk, the city manager and the civil service commission. Each member of the department then shall be assumed to have knowledge of and shall become subject to such rules. * * *"

The rule in question was duly approved by the city manager and was filed as required by the code provisions. It reads as follows:

"*Section* 101: No Police Officer of the City of Muskegon Police Department shall hereafter be, or become a member of any organization in any manner identified with any Federation or Labor Union which admits to membership persons who are not members of the Muskegon Police Department, or which would in any way exact prior consideration and prevent such officer from performing full and complete police duty at any time. Any Police Officer now a member of such unions shall disassociate himself within thirty day from this date. Failure to comply will constitute reason for immediate dismissal."

The situation to which the rule was intended to apply obviously had been under consideration by municipal officers prior to the adoption of the rule. Under date of March 14, 1961, the Muskegon city commission took the action indicated by the following statement and resolution:

"61-165. *Resolution on Banning of Union Affiliation by Police Officers Adopted.*

"Certain of the Police Officers of the City of Muskegon Police Department are dues paying members of Local No. 201, Muskegon County and Municipal Employees Union affiliated with the American Federation of State, County and Municipal Employees, AF of L. CIO.

"This Commission, as well as past Commissions, have seriously questioned whether a police officer can be a member of such a union and still enforce, impartially and without prejudice the laws of our city, county, and state of Michigan.

"Every police officer who joins the Muskegon Police Department must take an oath of office to support the constitution and bear allegiance to his city and state and its constitution and laws and to the best of ability, skill and judgment, diligently and faithfully, without partiality or prejudice, execute his office. Police officers are invested with broad powers, few of which are given to any other government employee. They have the legal right to carry a weapon, their powers of restraint, arrest and control of moral and physical behavior of others are grave and serious. A police officer is required by law and invariably becomes a neutralizer in controversies involving the right of public assemblage, neighborhood disputes, domestic difficulties and strikes, between labor and management. Again, his actions in these instances must be governed by his oath of office. He must recognize certain rights of people among which is the right of collective bargaining on the part of labor. Yet, at the same time, he must protect the rights and the property of management. In this instance, again, his neutrality must be the watchword of his every activity in the effort to protect the life and property of all those involved and to preserve peace and order during periods of such difficulty.

"This Commission subscribes to this statement of responsibility and, as such, cannot further condone police officers of the City of Muskegon to continue to be members of a union.

"In the belief that we are acting in the best interest of all of the citizens of the City of Muskegon, the following resolution is presented.

"Commissioner Carlson offered the following resolution and moved its adoption:

"No Police Officer of the City of Muskegon Police Department shall hereafter be, or become, a member of any organization in any manner identified with any Federation or Labor Union which admits to membership persons who are not members of the Muskegon Police Department, or which would in any way exact prior consideration and prevent such officer from performing full and complete police duty at any time. Any Police officer now a member of such unions shall disassociate himself within thirty days from this date. Failure to comply will constitute reason for immediate dismissal."

It is apparent that the rule promulgated by the chief of police was designed to carry out the purpose expressed by the resolution of the legislative body of the city. Plaintiffs in the instant litigation objected to the action taken and under date of April 7, 1961, filed a petition for a writ of mandamus to compel the city commission to reconsider its action or to submit the matter to a referendum vote under charter provisions applicable to ordinances. The trial court concluded that the resolution of the commission was not an ordinance and was, in consequence, not subject to a referendum.

On the same date that the mandamus proceeding was instituted plaintiffs filed suit in equity seeking injunctive relief against the enforcement of the commission's action and of the rule or regulation adopted by the chief of police. On the filing of the suit a temporary injunction was issued and proofs were taken in the case in April, 1961. On behalf of plaintiffs it was contended in the trial court that the regulation in question was uncertain in its provisions in that the word "Federation" carried an ambiguity, that the municipal action was arbitrary and unreasonable, and that it operated to deprive plaintiffs, and members of the police

force of the city of Muskegon who were also members of the plaintiff union, of rights protected by State and Federal constitutions. The trial court agreed with the contentions of the plaintiffs and entered a decree accordingly. Defendants have appealed.

We are unable to agree with the contention that the rule as adopted by the chief of police of defendant city is ambiguous because of the inclusion of the word "Federation" therein. A reading of the entire rule leaves no question as to its purpose and intent. The reference therein to "such unions" indicates clearly the meaning to be ascribed to the expression "Federation or Labor Union." A reading of the record suggests the absence of any question as to the application of the rule, if otherwise valid, to the plaintiffs herein.

The basic question at issue is whether the defendant city may through its duly constituted authorities prescribe a regulation of the character here involved for the members of its police department. It may be assumed that in taking the action in question due consideration was given to local conditions and to the protection of the public interest generally. That a municipality maintaining a police department may adopt reasonable rules in connection therewith is not open to question. Opinions may perhaps differ as to what may be regarded as reasonable, or as the converse thereof. In the instant case the presumption of validity attaches to the regulation adopted by the chief of police pursuant to the code of ordinances of the city, and the burden rests on those assailing it to establish that there is an unwarranted, and therefore arbitrary, interference with rights protected by constitutional guaranties. If the municipality has acted within the scope of its powers the regulation must be sustained.

Basically the question at issue is whether the city may exercise over the members of its police department the right of control asserted by the rule in question, rather than the effect of such rule on those employees who are within its scope. The restriction imposed is not directed at a class as such but, rather, solely at those who have sought and obtained employment in the police department of the defendant city. Decisions cited by counsel for plaintiffs re-

lating to racial discrimination are not in point. Like comment may be made with reference to De Jonge vs. Oregon, 299 U. S. 353, which involved the validity of the criminal syndicalism law of Oregon as applied to public meetings at which no unlawful conduct, teaching, or advocacy of unlawful acts, was discussed or urged.

In Fraternal Order of Police vs. Lansing Board of Police & Fire Com'rs, 306 Mich. 68, this Court had before it a suit brought by the plaintiff to restrain the defendant board from enforcing a resolution designed to prevent members of the police department from becoming members of the plaintiff organization. Plaintiff accepted as associate members private citizens who paid small fees for joining and were given identification tags that might be attached to their automobiles. It was held that defendant had acted within the scope of its authority and that neither plaintiff organization or any of its members had been deprived of constitutional rights. In reaching such conclusion it was said, in part:

> "The constitution and bylaws of plaintiff's national, state and local organizations which were received in evidence provide in effect that citizens may become associate members upon payment of dues of not less than $5 per year, and such associate members will be furnished 'a membership card' and car 'emblem.' One would be naive, indeed, to assume that such automobile emblem did not carry with it the intimation of special privileges to associate members. This of itself is enough to require the determination that the existence of plaintiff organization within the law-enforcement body of a municipality is contrary to public policy.
>
> "Defendant board is necessarily vested with a large measure of discretion and the burden of showing arbitrary action is upon those who charge it."

The above decision was followed in State Lodge of Michigan, Fraternal Order of Police vs. City of Detroit, 318 Mich. 182, which involved a regulation of the police commissioner of defendant city forbidding members of the

police force from being members of a fraternal order allowing other citizens to become associate members. The Court quoted with approval from the opinion in Carter vs. Thompson, 164 Va. 312 (180 S.E. 410), as follows:

> " 'Police and fire departments are in a class apart. Both are at times charged with the preservation of public order, and for manifold reasons they owe to the public their undivided allegiance. The power in the city of complete control is imperatively necessary if discipline is to be maintained.' "

In accord with prior holdings of this Court is the decision in Perez vs. Board of Police Commissioners of the City of Los Angeles, 78 Cal. App. 2d 638 (178 P. 2d 537). At issue there was a resolution of the board of police commissioners of Los Angeles forbidding police officers of the city to become members of any organization identified with "any trade association, federation or labor union which admits to membership persons who are not members of the Los Angeles Police Department, or whose membership is not exclusively made up of employees of the City of Los Angeles." The action of the trial court in sustaining the resolution was upheld. It was specifically held that there was no violation of the 14th amendment to the Federal constitution, and that the order of the defendant board was not arbitrary or unreasonable. In reaching the determination indicated, it was said in part:

> "Whether a rational connection exists between union membership and lack of competency as a police officer, obviously, is a matter of opinion. And the question was solely one for the Board of Police Commissioners to determine. Regardless of what the constitution and by-laws of any organization might provide for or against, it is idle to argue that such constitution and by-laws cannot be changed by amendment. Moreover, it was for the Board of Police Commissioners, as the representatives, agents and servants of the people, to determine what the first duties, indeed, all of the duties, of a police officer should be. It should be noted also, that the Board of Police Commissioners

probably took into account the fact that labor unions are active politically, whereas civil service employees are prevented by law and as a condition of employment, from taking an active part in politics while on official duty or during working hours and, that means would be thus provided for doing indirectly and with impunity, that which the law specifically prohibits."

The Court also quoted from the opinion of the trial judge as follows:

"'In *Hayman vs. City of Los Angeles*, 17 Cal. App. 2d 674, 679 [62 P. 2d 1047], in considering a question whether the discharge of a civil service employee was in violation of his rights to freedom of speech and of the press, and arbitrary, the court said:

"'"The right which is involved here is not that which petitioner thinks has been denied him, but is the right of respondents to exercise a reasonable supervision over city employees, to the end that proper discipline may be maintained and that activities among employees be not allowed to disrupt or impair the public service. Such is not only the right but the duty of the city and its several departments. In the exercise of this duty they must be allowed a wide discretion and their acts are not subject to review by the courts until they have reached the point of illegality."

"'"The rule adopted by the resolution here in question does not on its face appear unreasonable or arbitrary in the light of the foregoing authorities. Nor is it in violation of any constitutional right of police officers. If the rule is necessary and reasonable it cannot be charged with wrongfully depriving the police members of any constitutional right. All such rights are relative. Nor does the rule amount to a bill of attainder, nor does it produce or inflict any of the incidents of such a legislative act. It was the result of a decision by the board in the exercise of that wide discretion which is accorded to them. Neither this court nor any judge thereof has the power to substitute its

> or his contrary views as to the propriety, necessity, desirability or reasonableness of the rule. The rule having been created by the Board under and within its charter powers, and no appearance of unreasonableness or arbitrariness or unconstitutionality manifesting itself therein, it must be concluded that such rule cannot have reached the point of illegality and subject to review and annulment by the courts either by direct action or by means of injunction against enforcement thereof.' "

The regulation involved in the instant case is limited in its application to members of the police department of the City of Muskegon and it applies to them solely in their capacity as such members. As this Court pointed out in City of Detroit vs. Division 26 of the Amalgamated Association of Street, Electric Railway & Motor Coach Employees of America, 332 Mich. 237, there is no provision of either State or Federal Constitution which gives to individuals the right to be employed in government service or the right to continue therein. In said case the constitutionality of the so-called Hutchinson act* was upheld as applied to the Detroit transportation system and the employees thereof. In disposing of the issues raised it was said, in part:

> "There is ample authority to the effect that public employment does not vest in such employees any fixed or permanent rights of employment. As individuals or in groups public employees may discontinue their employment, but, having done so, such public employees have no vested right to insist upon their reemployment on terms or conditions agreeable to the employees, or even without compliance with such conditions. To hold otherwise would result in public agencies being powerless to render public service and to effectively administer public affairs; and the public would thereby be deprived of its right to efficient

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* PA 1947, No 336 (CL 1948, § 423.201 *et seq.* [Stat Ann 1960 Rev. § 17.455(1) *et seq.*]).

government. For example, if the members of a fire department or of a police department collectively refuse to continue to serve except upon conditions insisted upon by them, unless their employer supinely yielded, the public, which by taxation pays therefor, would be deprived of fire or of police protection; and the right or power to exercise essential governmental affairs nullified. There seems to be ample reason and authority for holding that the right of public employees to collectively refuse to render the service for which they are employed differs in legal point of view from the right of private employees to strike, and hence the classification of 'public employees' for the purpose of applicable legislation is valid."

Plaintiffs herein have not borne the burden of proof of showing that members of the police department of Muskegon are deprived by the enforcement of the regulation in question of any constitutional rights to which they are entitled. As before suggested, they cannot claim a constitutional right to be appointed as members of said department, or to continue therein. They are subject to the authority of the municipality, granted by the constitution and laws of the State, to manage its local affairs and to regulate the departments of municipal government. The duly constituted authorities of the city have concluded that the regulation here under attack is reasonably required in the interests of a fair and impartial administration of the law by those entrusted with its enforcement, without discrimination or partiality. The basic principles recognized in the prior decisions of this Court and by courts in other States as well are applicable here. On the record before us it may not be said that the rule is unreasonable or arbitrary in its application.

In addition to the questions raised in circuit court and passed on there plaintiffs claim on appeal that the decree entered should be upheld on the theory that the regulation promulgated by the chief of police of Muskegon contravenes P. A. 1952, No. 225 (C.L.S. 1956, § 117.5a [Stat. Ann. 1961 Cum. Supp. § 5.2084 (1)]). Said act, which

amended the city home rule act * by adding section 5a, reads as follows:

> "No city shall have power to deny employment except by city ordinance to any person for the reason that he is a member of any society which is incorporated under the laws of this state, the membership of which is composed solely of law enforcement officers, unless same is contrary to his oath of office."

In the instant case we are not concerned with membership by police officers of defendant city in any organization or society composed solely of law enforcement officers. The suggestion that the section quoted is contravened by the municipal regulation under consideration is without merit. Neither may it be said that the veterans' preference act of the State** precludes the adoption of such a regulation or its application to members of the police department of a home rule city. Said act was not intended to infringe upon constitutional rights of local municipal government vested by the constitution in cities of the State. Smith vs. Flint City Commission, 258 Mich. 698, 700, 701.

The decree of the circuit court of Muskegon County is reversed and the case is remanded with directions to dismiss plaintiffs' bill of complaint. No costs are allowed.

---

* PA 1909, No 279, as amended (CL 1948 § 117.1 *et seq.*, as amended [Stat Ann 1949 Rev & 1961 Cum Supp § 5.2071 *et seq.*]).

** PA 1897, No 205, as amended (CL 1948, § 35.401 *et seq.*, as amended [Stat Ann 1961 Rev § 4.1221 *et seq.*]).

ORDER OF SUPREME COURT

At a session of the Supreme Court of the State of Michigan, held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the 7th day of March in the year of our Lord one thousand nine hundred and sixty-three.

Present the Honorable,
Leland W. Carr,
Chief Justice.
John R. Dethmers,
Harry F. Kelly,
Eugene F. Black,
Thomas M. Kavanagh,
Theodore Souris,
Otis M. Smith,
Associate Justices.

This cause having been brought to this Court by appeal from Muskgeon Circuit Court, and having been argued by counsel, and due deliberation had thereon, it is now ordered by the Court, that the decree of the circuit court be and the same is hereby reversed and remanded with directions to dismiss plaintiffs' bill of complaint. It is further ordered that no costs be awarded herein. Justice O'Hara did not participate.

In the Supreme Court—ss.

I, Donald F. Winters, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the annexed and foregoing is a true and correct copy of the record, as contained in the appendix filed by the parties, and of all proceedings had and determined in the above entitled cause, by said Supreme Court; that I have compared the same with the originals and that they are a true transcript thereof and of the whole thereof.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the said Supreme Court at the city of Lansing, this 15th day of May, in the year of our Lord, one thousand nine hundred and sixty three.

Donald F. Winters,
Clerk of the Supreme Court of Michigan.

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JUN 20 1963
JOHN F. DAVIS, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

NO. [redacted] 178

LOCAL NO. 201, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES (AFL-CIO) and DONALD F. BRUSTAD, Individually and as President of said Local No. 201,
Petitioners,

vs.

CITY OF MUSKEGON, a Municipal Corporation,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

NO. 1150

LOCAL NO. 201, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES (AFL-CIO) and DONALD F. BRUSTAD, Individually and as President of said Local No. 201,

Petitioners,

vs.

CITY OF MUSKEGON, a Municipal Corporation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF CASE

(Italics ours unless otherwise indicated)

On March 14, 1961, the Muskegon City Commission adopted the following preamble and resolution:

> "61-165. *Resolution on Banning of Union Affiliation by Police Officers Adopted.*

> "Certain of the Police Officers of the City of Muskegon Police Department are dues paying members of Local No. 201, Muskegon County and Municipal Employees Union affiliated with the American Federation of State, County and Municipal Employees, AF of L, CIO.

"This Commission, as well as past Commissions, have seriously questioned whether a police officer can be a member of such a union and still enforce, impartially and without prejudice the laws of our city, county and state of Michigan.

"Every police officer who joins the Muskegon Police Department must take an oath of office to support the constitution and bear allegiance to his city and state and its constitution and laws and to the best of ability, skill and judgment, diligently and faithfully, without partiality or prejudice, execute his office. Police officers are invested with broad powers, few of which are given to any other government employee. They have the legal right to carry a weapon, their powers of restraint, arrest and control of moral and physical behavior of others are grave and serious. A police officer is required by law and invariably becomes a neutralizer in controversies involving the right of public assemblage, neighborhood disputes, domestic difficulties and strikes, between labor and management. Again, his actions in these instances must be governed by his oath of office. He must recognize certain rights of people among which is the right of collective bargaining on the part of labor. Yet, at the same time, he must protect the rights and the property of management. In this instance, again, his neutrality must be the watchword of his every activity in the effort to protect the life and property of all those involved and to preserve peace and order during periods of such difficulty.

"This Commission subscribes to this statement of responsibility and, as such, cannot further condone police officers of the City of Muskegon to continue to be members of a union.

"In the belief that we are acting in the best interest of all of the citizens of the City of Muskegon, the following resolution is presented:

"Commissioner Carlson offered the following resolution and moved its adoption:

"No Police Officer of the City of Muskegon Police Department shall hereafter be, or become,

> a member of any organization in any manner identified with any Federation or Labor Union which admits to membership persons who are not members of the Muskegon Police Department, or which would in any way exact prior consideration and prevent such officer from performing full and complete police duty at any time. Any Police Officer now a member of such unions shall disassociate himself within thirty days from this date. Failure to comply will constitute reason for immediate dismissal" (56a-58a).

On March 16, 1961, the following Rule was promulgated by the Chief of Police of the City of Muskegon and approved, in writing, by the City Manager in keeping with the provisions of Sec. 2-203 of the Code of Ordinances of the City of Muskegon (52a-53a):

> "*Section 101:* No Police Officer of the City of Muskegon Police Department shall hereafter be, or become a member of any organization in any manner identified with any Federation or Labor Union which admits to membership persons who are not members of the Muskegon Police Department, or which would in any way exact prior consideration and prevent such officer from performing full and complete police duty at any time. Any Police Officer now a member of such unions shall disassociate himself within thirty days from this date. Failure to comply will constitute reason for immediate dismissal" (52a).

On April 7, 1961, plaintiffs filed two suits. Both suits were initially based upon the assumption that the above "Resolution" was in fact an "Ordinance". The first suit was a petition for writ of mandamus designed to compel the City Commission to reconsider its action, and if not entirely repealed, to submit the matter to a referendum vote in keeping with the provisions of Chapter 7 of the Charter of the City of Muskegon which applied to Ordinances (5a-7a). The second suit was a bill of complaint praying for a temporary injunction prohibiting enforcement of the "Ordinance" or any regulation or rule adopted

by the Police Department pursuant thereto pending completion of the mandamus proceeding (48a-50a). An amended and supplemental bill of complaint was later filed praying for a permanent injunction (51a-70a).

Orders to show cause were issued in each case and a temporary injunction was issued in the chancery case (8a, 50a). Answers were filed and issue joined (9a-14a, 51a-58a, 72a-76a).

By stipulation, the cases were consolidated for hearing, and proofs taken in one case were to be considered as proofs in the other (198a-199a).

Proofs were taken on April 11 and 17, 1962 (198a, 210a). Aside from testimony as to purely formal matters such as the adoption of the resolution, etc. (198a-231a), the only testimony presented was the testimony of the petitioner, Donald F. Brustad, who testified that he was a police officer and president of Local 201 (231a).

As to his duties where strikes were involved, he testified, in part:

> "A. I was only called on two of the strikes. One at the Sheldon, where they had a picket line up across the railroad tracks preventing the train to move in. I talked to one of the persons from the management side and one of the pickets there, and the engineer of the train. I called for the Lt. to come down and settle the issue there. And, by the time he got there, the engineer of the railroad said, 'well we will honor the picket lines', and they pulled their train out across for Getty Street.
>
> "The only other time we were called in by Fred A. Drata, at the present time President of the Brunswick Local because they had a man under the influence of alcohol on the picket line, and he did not want him there. We went down there, took him off the picket line, and placed him in the county jail, I believe, if my recollection is correct."

On April 6, 1961, an initiatory petition had been filed for a referendum vote on the following proposition:

> "THE CITY OF MUSKEGON ORDAINS:
>
> ALL NON-SUPERVISORY CITY EMPLOYEES, WITHOUT EXCEPTION, SHALL HAVE THE RIGHT TO ORGANIZE INTO UNIONS OF THEIR OWN CHOOSING AND TO BARGAIN COLLECTIVELY, OR TO REFRAIN FROM SUCH ORGANIZATION. THIS ORDINANCE SHALL NOT BE CONSTRUED TO AUTHORIZE STRIKES OR OTHER CONCERTED WORK STOPPAGES. THIS ORDINANCE SHALL BECOME EFFECTIVE TEN DAYS AFTER ENACTMENT" (16a).

In keeping with the suggestion of the trial court made in the course of argument in the mandamus case (15a), the above proposition was submitted to the voters of the City of Muskegon at a special election on June 12, 1961. The proposal was *defeated* by a vote of 2,841 to 2,418 (18a).

In an opinion filed June 14, 1961, the trial court held that the action of the City Commission of March 14, 1961, was not an ordinance (39a-40a). Since the action was held not to be an ordinance, the Charter provisions for a referendum vote were inapplicable, and the writ of mandamus was, therefore, denied (40a, 47a). The opinion (19a-47a) contained dictum to the effect that the resolution and rule were nullities for reasons amplified in a later opinion. The court ordered that the injunction previously issued in the chancery case continue until an opinion was filed in the chancery case (41a).

On October 24, 1961, the court filed a lengthy opinion in the chancery case (77a-196a) authorizing a decree permanently enjoining the City of Muskegon from giving effect to the resolution adopted March 14, 1961, or any regulation or rule adopted by the Muskegon Police Department or any other city agency pursuant thereto or in accordance therewith. A decree was entered accordingly (196a). Appeal was taken from the decree entered in the chancery case to the Supreme Court of the State of Michigan (197a-198a).

By unanimous opinion issued March 7, 1963, the Su-

preme Court of Michigan reversed the trial court decree, holding that the regulation was reasonable and proper and infringed no constitutional rights of petitioners (I-XII).

REASONS WRIT SHOULD BE DENIED

It has long been well settled law, based upon the soundest of legal principles, that a municipality may prohibit its police officers from belonging to labor unions which either admit to membership non-police officers or are affiliated with organizations with include non police officers as members.

The reason for the rule was stated in *Fraternal Order of Police vs. Lansing Board of Police and Fire Commissioners*, 306 Mich. 68, in which certiorari was denied by this Court in 321 U. S. 784, as follows:

> "A police officer is peculiar, sui generis, you may say, in its formation and in its relation to the city government. It is practically an organized force resembling in many respects a military force, organized under the laws of the United States and equally as important as to the functions it is required to perform.
>
> * * * It is a department which requires that the members of it shall surrender their individual opinion and power to act, and submit to that of a controlling head just as much as the common soldier must surrender his own opinion and power of action to that of his commanding officer. And there is the same necessity of discipline — of regulation existing in the police department that exists in regard to the military department."

Certiorari was also denied by this Court in the similar case of *State Lodge of Michigan, Fraternal Order of Police vs. City of Detroit*, 318 Mich. 182, 332 U. S. 818.

It should be noted that the rule involved in this case does not go nearly as far as rules which have been sustained by this Court in other cases. The rule adopted by the City of Muskegon *does not* preclude membership in *any* labor union. Police officers of the City of Muskegon are free to

form their own union and many rights are guaranteed to them under the laws of the State of Michigan. For example, Michigan's Hutchinson Act (*M. S. A.* 17.455 (1)) and Michigan's Mediation of Disputes Act (*M. S. A.* 17.454 (1) et seq.) contain the following provisions:

> "• • • That nothing contained in this act shall be construed to limit, impair or affect the right of any *public employee to the expression or communication of a view, grievance, complaint or opinion* on any matter related to the conditions, or compensation of public employment or their betterment, so long as the same is not designed to and does not interfere with the full, faithful and proper performance of the duties of employment."

Section 3 (*M. S. A.* 17.455 (3)) provides in part:

> "No person exercising any authority, supervision or direction over any public employee shall have the power to authorize, approve or consent to a strike • • • nor shall any such person *discharge or cause any public employee to be discharged or separated from his or her employment because of participation in the submission of a grievance* in accordance with the provisions of Section 7 of this act."

Section 7 (17.455 (7)) of the act provides:

> "Upon the request of a majority of any *given group of public employees* evidenced by a petition signed by said majority and delivered to the labor mediation board, or upon request of any public official in charge of such employees, it shall be the duty of the labor mediation board to forthwith mediate the grievance set forth in said petition or notice, and for the purpose of mediating such grievance, the labor mediation board shall exercise the power and authority conferred by said board by Sections 10 and 11 of Act No. 176 of the Public Acts of 1939 (Mediation of Disputes Act)."

The rule involved in *City of Jackson vs. McLeod*, 199 Miss. 676, 24 So. 2d 319, in which certiorari was denied by

this Court in 328 U. S. 863, precluded police membership in *any* union.

The same was true in *Hutchinson vs. Magee*, 278 Pa. 119, 122 A. 234; *McNatt vs. Lauther*, (Tex. Civ. App.) 223 S. W. 503; *San Antonio Fire Fighters' Union vs. Bell*, 223 S. W. 506; and *Carter vs. Thompson*, 164 Va. 312, 180 S. E. 410.

See also *King vs. Priest*, 357 Mo. 68, 206 S. W. (2d) 547, in which an appeal to this Court was dismissed in 333 U. S. 852 and rehearing denied in 333 U. S. 878.

The rule is summarized in the very fine annotation appearing in 31 *A. L. R.* (2d) page 1149 as follows:

> "The right of public employees in general to join or become members of labor units is becoming increasingly recognized, *with the one marked exception that municipal firemen and policemen*, and in some instances public school teachers (this is not universally true) *are barred from union membership*. Policemen and firemen are denied union membership because they owe *undivided allegiance to the public*, and because it is absolutely necessary to the maintenance of discipline in the two services that public authorities have complete control over them."

The only reason suggested by petitioners for this Court reviewing a rule of law which has been established with unanimity is that all of the decisions were made prior to the year 1947. Petitioners cite some wholly unrelated and totally dissimilar cases dealing with racial problems and quotes broad language from those cases as supporting petitioner's position. While it may be necessary for members of the N.A.A.C.P. to associate and band together for the "advancement of ! lief and ideas" in Little Rock, Louisiana and Alabama in order to exercise their constitutional rights of free speech, press and assembly, it is not suggested that it is necessary for the police officers of the City of Muskegon to associate and band together to exercise their rights of free speech, press and assembly. The only real reason which might be suggested for plaintiff's request that the well established rule be reviewed is an intense desire on the part of the American Federation of State, Coun-

ty and Municipal Employees, to have police officers as members.

A. Burden of Proof.

It was unquestionably the fact that the trial judge in this case fell into the pitfall of placing the burden of proof upon the City of Muskegon that led him into error. It is also quite apparent that he was mislead by broad statements of law, taken completely out of context and from wholly unrelated cases, that resulted in this error. The correct rule, long established by precedent, is stated in 11 *Am. Jur. Pr.*, page 1088-1089 as follows:

> "All general principles relating to the *presumptions of validity* surrounding legislation and to the *duty of the courts to uphold* legislative action if possible *apply with particular emphasis to exercises of the police power.* The constitutionality of such measures is presumed, and it must also be presumed that the legislature has carefully investigated and determined that the interests of the public require such legislation, for the courts are reluctant to attribute a want of good faith in the exercise of the power. Moreover, it is their *duty to sustain police measures unless such are clearly, plainly, and palpably in violation of the Constitution.* It is *not enough that the case is a doubtful one*; the act must be so clearly unreasonable that the court can say that *no fair-minded man can think it reasonable.* An earnest conflict of serious opinion does not suffice to bring such an act within the range of judicial cognizance."

Speaking specifically of the exercise of police powers by municipalities, it is stated in 11 *Am Jur. Pr.*, page 1092, that:

> "A city, as the arm of the state, has in the exercise of the police power a wide discretion in determining what precautions in the public interest are necessary and appropriate under the circumstances. Its exercise of the police power will *not be interfered with by the courts in the absence of a clear abuse of discretion,*

> *unless it is manifestly unreasonable* and oppressive, for it is no within the province of the courts, except in clear cases, to interfere with the exercise of the power reposed by law in municipal corporations to pass ordinances relating to objects within the proper domain of the police power."

If petitioners' position were sound, the City of Muskegon could not ban its police officers from being members of the Communist Party without being prepared to prove that such membership created a "clear and present danger in the orderly processes of government." It took the F. B. I. many years of intensive investigation, and it took many months of trial to convict the eleven Communists a few years ago, and it is doubtful if the total cost to the Government has ever been computed. See *U. S. vs. Dennis*, 341 U. S. 494, wherein the Court observed: "The trial of this case extended over nine months, six of which were devoted to the taking of evidence, resulting in a record of 16,000 pages."

It is doubtful that the City of Muskegon could ever amass the evidence, much less bear the expense, of proving in a court proceeding that membership by one of its police officers in the Communist Party constituted a "clear and present danger to the orderly processes of government." Certainly the City of Muskegon could not prove that membership of one of its officers in the Ku Klux Klan posed a "clear and present danger," and yet we do not believe that plaintiffs would argue that such membership could not be prohibited. It is doubtful if the City of Pontiac could ever have proved by competent evidence, admissible in court, that membership in the "Black Legion" or "Unknown Legion" of one of its police officers created a "clear and present danger," but see *Mapley vs. City of Pontiac*, 288 Mich. 396.

Petitioners blandly assert in a footnote on page 6 of the Brief that "It is emphasized that there is no evidence in the record which would justify this assumption", that is, that membership in a union affiliated with unions admitting non-police officers to membership might result in "split loyalty". This statement is contrary to the facts.

Even if the City of Muskegon had the burden of proof of showing that "split loyalty" might result, the evidence shows that its fears in this respect were quite well-founded. We direct attention to the testimony of Officer Donald F. Brustad relative to his activities in connection with the Sheldon strike. He testified:

> "I was only called on two of the strikes. One at the Sheldon, where they had a picket line up across the railroad tracks preventing the train to move in. I talked to one of the persons from the management side and one of the pickets there, and the engineer of the train. I called for the Lt. to come down and settle the issue there. And, by the time he got there, the engineer of the railroad said, 'well we will honor the picket lines', and they pulled their train out across for Getty Street."

At the time the above activity took place, *M. S. A.* 17.454 (10.5), known as Michigan Bonine-Tripp Act, clearly provided:

> "It shall be unlawful (1) for any person or persons to hinder or prevent by mass picketing, unlawful threats or force the pursuit of any lawful work or employment, (2) *obstruct or interfere with entrance to or egress from any place of employment*, (3) *to obstruct or interfere with free and uninterrupted use of* public roads, streets, highways, *railways*, airports or other ways of travel or conveyance, or (4) to engage in picketing a private residence by any means or method whatever; Provided, That picketing to the extent that the same is authorized under constitutional provisions, shall in no manner be prohibited. Violation of this section shall be deemed a misdemeanor and punishable as such."

It is quite apparent from Officer Brustad's testimony that the above statute was being violated. As he put it, "they had a picket line up across the railroad track preventing the train to move in" (240a). The trial court gave his testimony the same interpretation and referred to "where a picket line had been stopping trains" (117a).

Why was Officer Brustad sent to the Sheldon Plant? No doubt a complaint had been received indicating a violation of law. What was he expected to do? As a law enforcement officer he was, of course, expected to enforce the law. What did he do? He testified he talked to "one of the persons from the management side and one of the pickets there, *and the engineer of the train.*". What happened? Nothing except delay. He went on to testify that he called for the *Lieutenant to come down and settle the issue.* And what happened after that? According to Officer Brustad's testimony, by the time he (the Lieutenant) got there, the engineer said "well, we will honor the picket lines," and they pulled their train out across for Getty Street (240a).

It is quite apparent from this terse but enlightening bit of testimony that a train going into the Sheldon plant had been stopped by pickets contrary to law. It is equally apparent that the engineer's first intent was to proceed on into the plant, otherwise he would have left immediately and the police would not have been called. Why did the engineer change his mind? All we know is that he changed it *after* Brustad talked to him. No doubt he had other freight on the train which required delivery and the delay was vexing and expensive, but why the parting words "Well we will honor the picket line"?

We have no information as to how vital the shipment was to Sheldon or the economic loss that resulted from its non-delivery, just as we do not know exactly what Brustad said to the engineer.

This also points up the fallacy in petitioner's assumption that partiality on the part of an officer would be readily apparent and susceptible of proof. Such is simply not the case.

Had Brustad impartially, but firmly, advised the pickets that it was a violation of the Bonine-Tripp Act to obstruct entrance to or egress from a place of employment, or to interfere with the free and uninterrupted use of a roadway, it is fair to assume that they would have complied with the law. But what did Brustad do? He vacillated. First he talked to someone from management. Then he talked to a picket. Then he talked to the *engineer.* Then he called for the Lieutenant to do what he was sent to do in the first

place. The result: The law was not impartially upheld, and the Sheldon Company was deprived of a shipment it was lawfully entitled to receive.

While no one can say for certain that Brustad's failure to enforce the law resulted from a want of impartiality rather than mere ineptitude, he obviously approached the situation in a half-hearted manner and his effor resulted in a failure of law enforcement.

Rather than the record being void of any evidence to support the City's assumption, Brustad's own testimony supports it.

Even if the record were void of any evidence of a union member police officer having shown partiality in a labor-management dispute, this would not justify a conclusion that the regulation is unreasonable, any more than a showing that no theatre had even caught fire in the City of Muskegon would justify a holding that an ordinance requiring theatres to maintain fire escapes is unreasonable, arbitrary and void.

B. Rule Reasonable and Proper.

Compared to the rules which have been upheld in other states, the rule adopted by the Muskegon Police Department is extremely reasonable. As noted previously, the police officers are free to form their own union, to present grievances, and have those grievances mediated by the State Mediation Board. Most of the rules preclude membership in *any* labor union. As an example of extreme legislation, see *North Carolina Statute G. S.* 95-85 referred to in the *North Carolina Law Review*, Volume 38 (1960), page 198-200, which reads in part as follows:

> "No employee of the State of North Carolina, or of any agency, office, institution or instrumentality thereof, or any employee of a city, town, county or other municipality or agency thereof, or of any public employee or employees of an entity or instrumentality of government shall be, become, or remain a member of *any trade union, labor union or labor organization* which is, or may become, a part of or affiliated in any way

with any national or inter-national labor union, federation, or organization, and which has as its purpose or one of its purposes, collective bargaining with any employer mentioned in this article with respect to grievances, labor disputes, wages or salary, rates of pay, hours of employment, or the conditions of work of such employees . . . ."

The present case is on all four with *Perez vs. Board of Police Commissioners of the City of Los Angeles*, 78 Cal. App. 2d 638, 178 P. 2d 537.

For other cases upholding similar or more stringent rules, see *McQuillin, Municipal Corporations*, 3rd Ed., Vol 3, Sec. 12.141; *Ryan Labor Unions and Municipal Employe Law*, NIMLO, 1956, page 265, and *McQuillin, Municipal Corporations*, 3rd Ed., Vol. 4, Sec. 12.243.

It is interesting to note in passing that the *National Labor-Management Relations Act* of 1957, Section 159, *F. C. A. Tit.* 29, Sec. 159 (b) places a similar restriction upon plant guards who perform a function similar to that of police officers. The provision prevents the National Labor Relations Board from recognizing, as an appropriate bargaining unit, any unit

> . . . . "if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards *if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership employees other than guards.*"

No one has suggested that the above provision is an unreasonable regulation in violation of Article I of the Constitution or any other provision thereof.

CONCLUSION

The petition for writ of certiorari should be denied.

Dated: June 13th, 1963.

Respectfully submitted,

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